STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS AND THE WORKERS' COMPENSATION APPELLATE COMMISSION

CHARLES SINGTON,

Plaintiff-Appellee,

vs

DAIMLERCHRYSLER CORPORATION,
Self-insured,

Defendant-Appellant.

Supreme Court:
119291

Court of Appeals:
225847

Lower Court:
WCAC No. 930530

BRIEF ON APPEAL -- PLAINTIFF-APPELLEE

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STATEMENT OF QUESTION PRESENTED

BECAUSE PLAINTIFF WAS ENGAGED IN REASONABLE EMPLOYMENT WHEN HE SUFFERED HIS STROKE, DID THE COURT OF APPEALS CORRECTLY HELD THAT HIS ENTITLEMENT TO BENEFITS MUST BE DETERMINED PURSUANT TO THE REASONABLE EMPLOYMENT STATUTE, AND DO ITS TERMS REQUIRE THE RESUMPTION OF BENEFITS?

Plaintiff-Appellee answers "YES."
The WCAC answered "NO."
The Court of Appeals answered "YES."

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STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(Numbers in parentheses followed by "a" shall refer to pages of defendant-appellant's appendix. Numbers followed by "b" shall refer to pages of plaintiff-appellee's appendix.)

The proceedings described below were initiated upon the December 15, 1997 filing by plaintiff Charles Sington of an application for hearing, alleging a left shoulder injury on June 24, 1994 and a right shoulder injury on August 15, 1996, and alleging disability as the result of each injury.

Plaintiff worked for defendant Chrysler Corporation as a floater (10b). In that job, he welded, stacked, and loaded parts, equipment, and motor blocks (10b-11b). These tasks required him to lift, reach, stretch, pick up, and bend over all day long (11b).

On June 24, 1994, plaintiff slipped in some water and "fell real hard" on the floor (12b). He subsequently underwent left shoulder surgery during October of 1994 (1b,12b-13b).

Plaintiff returned to work on January 3, 1995 (2b-3b). At that time, restrictions were imposed permitting only partial use of his left upper extremity, and no work above the shoulder for the left arm (4b). The restrictions were considered permanent (4b-5b).

As a result, plaintiff was placed on "very light work" (14b). He was made part of a four-man rotation, which permitted him to reach solely with his right arm (14b). Thereafter, he did a number of jobs, all "lighter" work than that he performed previously (14b-15b).

As plaintiff continued relying solely upon his right arm, he began to have problems with that arm as well (15b-16b). He finally left work on August 14, 1996, after which he had surgery on his right shoulder (6b-7b).

Plaintiff returned to work once more on November 15, 1996 (7b). At that time, his prior restrictions were continued, and additional restrictions were imposed precluding the lifting, carrying, pushing, or pulling of more than 20 pounds with either

shoulder (7b-9b). Plaintiff did the same work after his right shoulder surgery as he had been doing since his left shoulder problems arose (19b,20b-21b).

Further testimony came from Reginald Baldwin, a production supervisor for whom plaintiff worked from October or November of 1995 (22b-23b). Mr. Baldwin testified that plaintiff's restrictions meant that there were "several jobs in the area, my area, that he couldn't handle" (26b). Mr. Baldwin tried to give plaintiff work that conformed with his restrictions (24b). On occasion, plaintiff came to Mr. Baldwin, indicating that he was having problems with a particular job, and Mr. Baldwin tried to move him to a different position (25b,26b).[1]

Plaintiff last worked on March 7, 1987, and suffered a stroke three days later on March 10 (I 84). Thereafter, he was granted a disability pension (17b-18b).

At the close of proofs, in a decision mailed from the Bureau on February 17, 1999, Magistrate John M. Wierzbicki held that plaintiff had proven that he suffered a left shoulder injury[2] on June 24, 1994, after which "...he was disabled because of his inability to perform his work duties and was diminished in his wage earning capacity as a direct result" (13a).

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[1]As this testimony makes clear, defendant has incorrectly stated that, after plaintiff's injury, he continued to "perform the same job that he had been performing at the time of his injury..." Defendant's Brief, at 1. In fact the Court of Appeals expressly held that "the undisputed testimony established that plaintiff could not perform certain job duties within his department and that defendant accommodated plaintiff's medical restrictions by assigning him to less strenuous jobs..." (33a). Defendant has not directly challenged this finding on appeal, or asked that it be reversed.

[2]The magistrate further held that plaintiff had failed to prove that his right shoulder condition was work-related (16a).

However, the magistrate further held that plaintiff's disability was not "compensable" because it did not cause any wage loss, writing:

> "The Plaintiff's left shoulder injury on 3/24/94 was due to his slip and fall, not due to his physical work activities. He performed the same job on 3/24/94 that he performed subsequently - both before and after his right shoulder problem. He then, for the most part, continued performing said job up until his last day of work. This job was the unloading of doors by sliding them off of a conveyor, and then sliding them into racks. There was little lifting, and there was no raising of either arm required above horizontal. The Plaintiff had, all along, been performing a regular plant job - before and after his injuries. I am convinced that the Plaintiff, upon his last day of work, did not experience any wage loss, whatsoever, because of his 3/24/94 workplace injury. The reason he is disabled is his unfortunate stroke in 3/97. But for said event, he would have continued at his regular job, a job which was conveniently within his recommended restrictions." (13a)

Plaintiff filed a timely appeal from this determination with the Workers' Compensation Appellate Commission ["WCAC"]. However, in an opinion and order dated February 14, 2000, the WCAC affirmed the magistrate's decision (21a). It found that plaintiff had not been performing reasonable employment at the time of his stroke, so that the reasonable employment statute would not apply:

> "As quoted above, the magistrate viewed plaintiff as performing his 'regular job' upon return to work after his left shoulder surgery. Thus, although plaintiff's job 'conveniently' fell within the restrictions he needed as a result of his work-related left shoulder condition, the job did not constitute an accommodation of his injury, so as to be 'reasonable employment' under Section 301(5)." (20a)

The WCAC further agreed with the magistrate that plaintiff could have continued to perform his "regular job" had he not had the stroke, and therefore denied his claim:

> "Plaintiff did not have a compensable disability during the period that he continued to perform his regular job with defendant, after the left shoulder injury. Consequently, when plaintiff had to leave his employment due to his unfortunate non-work-related stroke, it was the stroke which clearly and directly was the reason for his subsequent wage loss. The record supports this factual assessment by the magistrate, MCL 418.861a(3), and based upon that supported factual assessment, the magistrate correctly applied the law." (20a)

Plaintiff subsequently sought leave to appeal to the Court of Appeals, which was granted on July 28, 2000 (24a). In an opinion dated May 1, 2001, the Court reversed the WCAC, finding that plaintiff <u>was</u> in fact engaged in reasonable employment at the time of his stroke...

> "Because the undisputed testimony established that plaintiff could not perform certain job duties within his department and that defendant accommodated plaintiff's medical restrictions by assigning him to less strenuous duties, we conclude as a matter of law that defendant offered plaintiff 'reasonable employment' within the meaning of WDCA § 301(9). Therefore, WDCA § 301(5) applies to plaintiff's application for benefits." (33a)

...and that the effect of the end of that reasonable employment was to be resolved through application of the reasonable employment statute:

> "The statute provides that injured workers engaged in 'reasonable employment' shall receive benefits even if they cease working either 'through no fault of the employee' or 'for whatever reason.' MCL 418.301(5)(d), (e); MSA 17.237(301)(5)(d), (e). An injured worker engaged in 'reasonable employment' need not prove that he lost his job for reasons directly related to his injury. Therefore, once an employee accepts and begins to perform 'reasonable employment,' the specific provisions found in § 301(5)(e) take precedence over *Haske's* general requirement that the wage loss must be causally linked to the work-related injury." (34a)

As a result, the Court remanded the case to the WCAC "for further proceedings consistent with this opinion..." (35a).

Defendant subsequently sought leave to appeal to this Honorable Court, which was granted on January 4, 2002 (36a). In granting leave, the Court directed that the parties...

> "...to include among the issues to be briefed whether the magistrate and the WCAC erred by granting plaintiff an award of workers' disability compensation benefits under the facts presented here. In particular, the parties shall discuss whether *Haske v Transport Leasing, Inc*, 455 Mich 628 (1997), and *Powell v Casco Nelmor Corp*, 406 Mich 332 (1979) are reconcilable. The parties shall also discuss whether *Powell* or *Haske* can be reconciled with disability determinations under MCL 418.301(4), and weekly wage loss benefit determinations in light of subsequent reasonable employment under MCL 418.301(5) and MCL 418.301 (9). That is, the parties shall address whether and to what extent a subsequent event may end entitlement to disability benefits by breaking the causal relationship between a work-related injury and wage loss." (34a)

Plaintiff now files this brief in support of his position on appeal.

ARGUMENT

BECAUSE PLAINTIFF WAS ENGAGED IN REASONABLE EMPLOYMENT WHEN HE SUFFERED HIS STROKE, THE COURT OF APPEALS CORRECTLY HELD THAT HIS ENTITLEMENT TO BENEFITS MUST BE DETERMINED PURSUANT TO THE REASONABLE EMPLOYMENT STATUTE, AND ITS TERMS REQUIRE THE RESUMPTION OF BENEFITS.

Plaintiff is aware that this Court directed the parties to brief the issue of whether *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628; 566 NW2d 896

(1997) could be reconciled with MCL 418.301(4), the statutory definition of "disability" in the Michigan Workers' Disability Compensation Act ["WDCA"]. Accordingly, it would seem that this issue is fair game. However, plaintiff would note for the record that this issue was never preserved below. In fact, rather than attacking it, defendant actually *relied* upon *Haske* before the Court of Appeals.

As a result, this Court need not reach any issue regarding the efficacy of *Haske*. *Young v Morrall*, 359 Mich 180, 187; 101 NW2d 130 (1960); *Portell v Feldman*, 354 Mich 611, 614; 93 NW2d 305 (1958). If *Haske* is on the table nonetheless, plaintiff submits that it is not reconcilable with §301(4).

MCL 418.301(4) defines "disability" as follows:

> "As used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss."

As this language makes clear, a claimant is disabled if he or she has sustained "a limitation" of wage-earning capacity, resulting from a personal injury or work-related disease.

The statutory language further differentiates between wage-earning capacity and wage loss. Only the former is a part of the definition of "disability." However, as noted, the establishment of disability does not necessarily imply a corresponding loss of wages.

The *Haske* Court somewhat re-cast these elements, in a fashion inconsistent with the statute. It created a three-part test it described as follows:

> "In application, these basic principles operate to require that an employee must establish (1) a work-related injury, (2) subsequent loss in actual wages, and (3) a causal link between the two. Proof of the three elements will establish that an employee can no longer perform at least a single job within his qualifications and training, thus satisfying the first sentence of 301(4), and that he has suffered a loss in wages, satisfying the second sentence of subsection 301(4). Consistent with the language of subsection 301(4) proofs sufficient to permit the magistrate to find that the subsequent wage loss is attributable to the work-related injury establish a compensable disability." *Haske, supra*, at 634-635 (footnote omitted).

This analysis mixes and then melds two distinct concepts -- wage-earning capacity and wage loss.

As the statutory language demonstrates, it is not the wage loss that must be the result of a personal injury or work-related disease. Instead, it is the wage-earning capacity that must so result. That being so, the third element of the *Haske* test is mis-focused, in that it mistakenly looks to the wage loss for the causal link with the injury. Defendant relies upon this error, even as it acknowledges it.[3]

Defendant suggests that, because plaintiff could still earn full wages after his injury, he cannot be found to be disabled. This is plainly contrary to the WDCA.

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[3] "*Haske* is remarkable because the *Haske* majority, after reading out of the statute the two phrases described above, re-introduces to some extent the ideas of '*wage capacity*' and '*resulting from* a work injury' in interpreting the second sentence of 301(4) where the phrases do *not appear.*" Defendant's Brief, at 14.

Defendant suggests that, because plaintiff could still earn full wages after his injury, he cannot be found to be disabled. This is plainly contrary to the WDCA.

MCL 418.301(4) itself makes it clear that one can suffer a limitation of wage-earning capacity and consequently establish disability (first sentence), and still not suffer a wage loss: "The establishment of disability does not create a presumption of wage loss" (second sentence).

This is also the premise of MCL 418.301(5), dealing with reasonable employment (which was previously referred to as "favored work"). This provision does not apply unless the claimant has first established disability pursuant to §301(4):

> "If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows..." MCL 418.301(5).

However, the subsection goes on to acknowledge that a disabled individual may still earn full wages, and merely suspends the right to benefits while that occurs:

> "If an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for the duration of such employment." MCL 418.301(5)(c).

Consequently, defendant's premise is faulty. That a claimant may earn full wages after a work injury is not enough to preclude a finding of disability. Instead, no benefits are payable while that state of affairs continues. Of course, if the claimant recovers altogether, he will no longer be disabled and no benefits will be payable in

any event. However, what is dispositive is whether a limitation in wage-earning capacity continues, not whether the wage loss continues. MCL 418.301(4).

Furthermore, the phrase "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training" does not require a showing of a complete elimination of earning capacity. It requires just what it says: "*a limitation*."

This particular language is consistent with the standard applied by this Court and the Court of Appeals *for decades*. In *Foley* v *Detroit United RR*, 190 Mich 507, 515; 157 NW 45 (1916), this Court set forth a definition of "disability" phrased in terms of the impairment, not elimination, of a claimant's wage earning capacity:

> "The weekly loss in wages referred to in this act shall consist of such percentage of the average weekly earnings of the injured employee, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the *impairment* of his earning capacity in the employment in which he was working at the time of the accident, but to be determined in view of the nature and extent of the injury. 1912 Mich Pub Acts No 10, Part II, §11 (1st Extra Session)." (emphasis added).

Since this seminal decision, the idea that *any* "impairment" or "limitation" of wage earning capacity would establish disability was reinforced time and time again over the ensuing decades.

For example, in *Garvie v Owens-Illinois, Inc*, 167 Mich App 133, 136-137; 421 NW2d 602 (1988), the Court of Appeals held that a claimant would be considered disabled upon proof of *any* limitation on his ability to compete:

> "An unskilled worker is disabled if there is any limitation on his ability to compete in the total field of

> unskilled common labor. *Adair v Metropolitan Building Co*, 38 Mich App 393, 401; 196 NW2d 335 (1972). The worker's ability to return to his own particular job is not the test. All that the claimant need show is that there is some resultant physical or mental incapacity that prevents him from competing fully in the field of unskilled labor. See *Bauer v Allied Supermarkets*, 139 Mich App 369, 377-378; 362 NW2d 283 (1984)."

See, also, *Adair* v *Metropolitan Building Co*, 38 Mich App 393, 401; 196 NW2d 335 (1972); *Tury* v *General Motors Corp*, 80 Mich App 379, 382; 264 NW2d 2 (1978); *Powell* v *Casco Nelmor Corp*, 406 Mich 332; 279 NW2d 769 (1979); *Kidd* v *General Motors Corp*, 414 Mich 578, 591-592; 327 NW2d 265 (1982). In *none* of these cases did the Court hold that an employee had to demonstrate his or her complete inability to work in order to receive an award of benefits. Again, only *a limitation* of that ability was required.

Consequently, the Legislature did not act in a vacuum when it enacted MCL 418.301(4). The language it utilized had history, and was not a new concept or a blank slate upon which simply anything could be written. *It had a pre-established meaning*. By defining "disability" in terms of "a limitation of an employee's wage earning capacity," the Legislature was employing the same language already in use for years, and it should be presumed to have adopted the longstanding judicial interpretation:

> "For example, it is a well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation. *Dean* v *Chrysler Corp*, 434 Mich 655, 667, n 18; 455 NW2d 699 (1990). Therefore, when the Legislature codifies a judicially defined requirement without defining it itself, a logical conclusion is that the Legislature

> intended to adopt the judiciary's interpretation of that requirement." *Pulver* v *Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994).

See, also, *Thomas* v *State Highway Dep't*, 398 Mich 1, 9-10; 247 NW2d 530 (1976).

As a result, by continuing the concept of a limitation of wage earning capacity, the Legislature should be presumed to have intended to continue as well the idea that this standard requires not *total* inability to work but instead merely *a* limitation. These phrases are clearly not equivalents.

Furthermore, the meaning of "a limitation" is clear even reading it without benefit of prior case law. "Limitation" does not have the same meaning as "elimination," "extermination," or "obliteration." The use of the qualifier "a" restricts the phrase even further in that "a" is the opposite of "total," "full," or "complete." Consequently, and contrary to defendant's position, the ability to earn wages post-injury is not fatal to a claim for workers' compensation benefits.

None of the interpretations suggested by defendant or its supporting *amici* acknowledge this simple analysis. Instead, defendant attempts to support its argument by reference to less than dispositive sources. For example, defendant cites to various versions of "legislative history," in an attempt to suggest that some meaning other than the one the plain language of the provision enacted is appropriate. However, what should matter is not the so-called legislative history, but instead the *actual legislation*.

United States Supreme Court Justice Antonin Scalia has offered the following cogent comments, relative to legislative history:

> "My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning." Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997) at 29-30.

Justice Scalia also highlighted a further important principal, originally voiced by Oliver Wendell Holmes: "We do not inquire further what the legislature meant; we ask only what the statute means." Scalia, *supra*, at 23.

What the statute means here is clear. "[A] limitation" means just that. It does not require total elimination or complete inability. Instead, it necessitates only a single limitation, and the *Haske* Court got that right. *Haske, supra*, at 634.

If there is any limitation of wage-earning capacity resulting from a personal injury or work-related disease, the claimant is disabled. If there is no wage loss, there is no right to benefits. However, the claimant still remains disabled and entitled to benefits if a wage loss later occurs, until a legally relevant event changes that status.

Of course, recovery would be one such event. If the claimant fully recovers, he or she will no longer have a limitation of wage-earning capacity, and will no longer be disabled. Similarly, if the claimant continues to have a limitation of wage-earning capacity, but it is no longer is the result of a personal injury or work-related disease, benefits are not payable. Conversely, if the limitation continues and remains work-related, so does the disability.

Once disability has been established, MCL 418.301(5), *the very next subsection after the definitional subsection*, sets forth a detailed system for the handling of post-injury wage earning capacity:

> "If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:
>
> "(a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.
>
> "(b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.
>
> "(c) If an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for the duration of such employment.
>
> "(d) If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job through no fault of the employee, the employee shall receive compensation under this act pursuant to the following:

> "(i) If after exhaustion of unemployment benefit eligibility of an employee, a worker's compensation magistrate or hearing referee, as applicable, determines for any employee covered under this subdivision , that the employments since the time of injury have not established a new wage earning capacity, the employee shall receive compensation based upon his or her wage at the original date of injury. There is a presumption of wage earning capacity established for employments totalling 250 weeks or more.
>
> "(ii) The employee must still be disabled as determined pursuant to subsection (4). If the employee is still disabled, he or she shall be entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury.
>
> "(iii) If the employee becomes reemployed and the employee is still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).
>
> "(e) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job for whatever reason, the employee shall receive compensation based upon his or her wage at the original date of injury." MCL 418.301(5).

By virtue of their location in the same section of the WDCA, §301(4) and §301(5) were clearly intended to work in tandem. This synergism moderates the standard of disability, offering employers significant rights and remedies to mitigate their liabilities.

If the employer has other work the employee can do, it need only offer that work and the employee is obliged to accept it. If the employee does not have good and reasonable cause for refusing to do so, his or her benefits will be suspended. MCL 418.301(5)(a). The work offered does not even have to be within the employee's qualifications and training:

> "'Reasonable employment', as used in this section, means work that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence. *The employee's capacity to perform shall not be limited to jobs in work suitable to his or her qualifications and training.*" MCL 418.301(9) (emphasis supplied).

Furthermore, the employer can assist its injured employee in finding work with another employer, MCL 418.301(5)(a), or even institute a program of vocational rehabilitation to retrain its injured employee for new or different work. MCL 418.319(1). If the employee does not cooperate with rehabilitation efforts, a loss of benefits can occur. Id.

As a result, employers have access to strong measures to help get injured workers that can work back on the job. If an injured employee is truly able to perform in the workplace to any significant extent, one of these avenues should prove fruitful, providing a clear avenue by which an employer can mitigate its liability. Furthermore, at some point, this mitigation can become permanent. If the employee is able to successfully engage in post-injury work for at least 100 weeks, a new wage earning capacity may be found to have been established. MCL 418.301(5)(d). If the work goes on for more than 250 weeks, a new capacity is *presumed*. MCL 418.301(5)(d)(i). Of course, once a wage-earning capacity has been established, there is no longer a limitation, at least to the extent of the new capacity.[4]

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[4]If the claimant's post-injury work pays less than did his pre-injury work, his new capacity would only relieve the employer of compensating the capacity re-established. For example, if a claimant earned $500.00 per week before his injury, and subsequently returns to a job that only pays him $200.00 a week for more than 250 weeks,

Quite obviously, the Legislature has created a comprehensive system for the establishment of a post-injury capacity, tied expressly to actual work offered and performed. It has further coupled the establishment of such an earning capacity to the performance of work over a period of time sufficient to demonstrate that the injured employee could continue to earn those wages even outside the protected environment of a restricted job or favored position.

Defendant and its supporting *amici*, however, would have this Court resolve the effect of the end of reasonable employment without even looking to the statute that was clearly enacted to cover such a situation. This is absurd.

Because plaintiff was found to have been engaged in reasonable employment on his last day of work, the Court of Appeals correctly held that his entitlement to benefits would be adjudicated pursuant to the provisions expressly applicable to such employment:

> "When an injured employee accepts an offer of 'reasonable employment,' WDCA § 301(5) requires that 'entitlement to weekly wage loss benefits shall be determined pursuant to this section.' MCL 418.301(5); MSA 17.237(301)(5)." (34a)

This is the only rational and logical approach as well. Defendant's proposed construction would permit the determination of the effect of the termination of reasonable employment without resort to the statute enacted for that very purpose. This is obviously not what the legislature intended in creating this statute, and the

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the employer would still have to make up the difference between $500.00 and $200.00, because that capacity will not have been restored.

Court of Appeals correctly noted that as well: "Application of the *Haske* compensable disability doctrine to injured employees who were engaged in 'reasonable employment' would render WDCA § 301(5) meaningless." (34a)

The Court of Appeals further (and accurately) noted that the reasonable employment provision establishes certain guidelines for a claimant's entitlement to benefits, once reasonable employment ends:

> "The statute then sets forth specific formulas for determining the benefit rate that must be paid to the injured worker. * * * The statute provides that injured workers engaged in 'reasonable employment' shall receive benefits even if they cease working either 'through no fault of the employee' or 'for whatever reason.' MCL 418.301(5)(d), (e); MSA 17.237(301)(5)(d), (e). An injured worker engaged in 'reasonable employment' need not prove that he lost his job for reasons directly related to his injury. Therefore, once an employee accepts and begins to perform 'reasonable employment,' the specific provisions found in § 301(5)(e) take precedence over *Haske's* general requirement that the wage loss must be causally linked to the work-related injury." (34a)

The Court therefore based its result upon the prevailing statute, and not upon *Powell v Casco Nelmor Corp*, 406 Mich 332; 279 NW2d 769 (1979). Instead, the Court merely noted that the *Powell* holding remained consistent with the current statute, and had not been superseded:

> "In summary, we hold that the WCAC erred as a matter of law when it held that the Legislature's adoption of WDCA § 301(5) nullified *Powell*. The portion of *Powell* on which plaintiff relies is consistent with the 'reasonable employment' provisions of WDCA § 301(5)." (34a)

Consequently, it was the statute, and not *Powell*, that provided the authority for the Court of Appeals' result.

This is entirely consistent with this Court's decision in *Powell v Casco Nelmor Corp*, 406 Mich 332; 279 NW2d 769 (1979). In that case, the Court wrote:

> "The Court of Appeals, however, found the WCAB had erred as to its above finding and stated:
>
> > "'An independent, intervening event, which follows a personal injury arising out of and in the course of employment, does not alone justify the denial, suspension, reduction, or increase of disability benefits for a continuing work-related injury. In the present case, plaintiff's throat cancer itself would not alter her right to collect workers' disability benefits if her hand injuries in fact diminished her wage-earning capacity." (Emphasis added.) (Appellant's Appendix, p. 34a)
>
> "We agree with this statement of the Court of Appeals and specifically find that plaintiff's post-hand-injury cancer does not adversely impact plaintiff's present right to benefits." *Id*, at 354-355.

Plaintiff's stroke did not alter his right to collect workers' compensation benefits for the limitation of his wage-earning capacity caused by his work-related shoulder condition. Unless his post-injury employment established a new wage-earning capacity[5], his right to benefits continues as a matter of law.

The *Powell* doctrine was modified in some respects by the statutory codification of the previous favored work doctrine. The primary modification concerned the establishment of a new wage-earning capacity. While *Powell* held that favored work could not establish a new wage-earning capacity, it now may, under expressly

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[5]The Court of Appeals preserved this question, and remanded the case to the WCAC for further proceedings in that regard (35a).

enumerated circumstances designed to ensure that post-injury work is of the nature and duration to properly so demonstrate. However, unless such a capacity is established, plaintiff's right to benefits continues, pursuant to the statute and/or *Powell*.

Furthermore, the Court of Appeals offered the only fair reading of the statute. This Supreme Court has held that the language of MCL 418.301(5)(e) means just what it says -- if employment is lost within the first 100 weeks, *whatever the reason*, workers' compensation benefits are payable: "When the employee has been employed pursuant to subsection 301(5) for less than one hundred weeks, the Legislature has decided that benefit availability continues." *Russell v Whirlpool Financial Corp*, 461 Mich 579, 588; 608 NW2d 52 (2000). Defendant's approach would vitiate the referenced language, in that any time reasonable employment ended for nonwork-related reasons, the claimant's disability would be declared noncompensable and benefits would not be payable. This is *not* "for whatever reason."

Plaintiff's stroke did not erase the effects of his work-related shoulder injury and the limitations it occasioned. That his stroke may have brought about the end of the reasonable employment is legally irrelevant, as long as the underlying and work-related disability continued. If the stroke occurred after less than 100 weeks, benefits are payable because the employment ended "for whatever reason." MCL 418.301(5)(e). If the stroke occurred after more than 100 weeks, the issue becomes whether a new wage-earning capacity has been established. If so, no benefits are payable without

regard to the stroke. If not, benefits remain payable because the underlying disability has not been legally eliminated. MCL 418.301(5)(d)(*i*).

This logic fits additional situations which should also be considered, more specifically the ramifications when economics rather than a nonwork-related condition cause the cessation of reasonable employment. The same argument is currently raised by defendants in both situations, and this Court should consider this aspect of the issue as well. The Court actually granted leave to appeal in a companion case involving such an issue. *Richardson v Woodbridge Corp* (Supreme Court Docket No. 119821). However, that case was later settled and redeemed.

In *Richardson*, the claimant was injured but subsequently returned to reasonable employment in which she engaged until her entire shift -- disabled and nondisabled workers alike -- was laid off for economic reasons. The defendant argued in that case that the claimant should receive no benefits because she lost her job for economic reasons that equally affected nondisabled employees. This is just another version of the argument being raised in this case -- that the claimant is not entitled to benefits if reasonable employment ends for any reason other than a work injury.

However, this argument ignores one important fact. Just as the effects of the instant plaintiff's stroke did not eradicate the ongoing residuals of his work-related shoulder injury, neither would an economic layoff erase the continuing effects of a work injury. The injured and then laid-off employee would simply be thrown into the open market, where she would have to compete with able-bodied employees not subject to the type of restrictions she has. While the work injury might not have

caused the end of the reasonable employment, it *would* hamper plaintiff's ability to find work elsewhere. As a result, the disabled and nondisabled workers would not find themselves in equal positions after a layoff.

Plainly, the employer in whose employ a work-related injury occurred would be most likely to extend an offer of light work thereafter. If that employer has no place for its own injured employees, it should not be assumed that others would. "[E]vidence of defendant's refusal to rehire" is "strong evidence of unemployability." *Sobotka* v *Chrysler Corp*, 447 Mich 1, 26; 523 NW2d 454 (1994), lead opinion of Boyle, J. However, accepting the argument that the claimant is not entitled to benefits if the work injury did not end the reasonable employment would leave the injured employee to the mercy of a marketplace that may have none.

It simply is not fair, let alone consistent with the statute, to declare that the lasting effects of a work injury effectively disappear if post-injury work ends for any other reason. Instead, MCL 418.301(5) contains express and explicit provisions that detail how and when a condition is compensable upon the end of reasonable employment.

Benefits must be paid when reasonable employment for less than 100 weeks ends "for whatever reason." MCL 418.301(5)(e). After 100 weeks, benefits resume only if the claimant has not re-established his or her wage-earning capacity. MCL 418.301(5)(d)(*i*). If reasonable employment lasts for over 250 weeks, it is presumed that a new capacity has been established. *Id.* Absent the establishment of a new capacity, or renewal of the prior capacity by virtue of a full recovery, benefits must

be paid, provided the disabled claimant has also suffered a wage loss. MCL 418.301(4).

This is the method chosen by the Legislature to adjudicate claims where reasonable employment has ended. Defendant's proposed construction would by pass this analysis, an intolerable result.

The Court of Appeals' decision should be affirmed accordingly.

RELIEF

WHEREFORE Plaintiff-Appellee CHARLES SINGTON respectfully requests this Honorable Supreme Court affirm the Court of Appeals' decision, and further grant him any other relief to which he may be entitled.

Respectfully submitted,

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